APPENDIX A PUBLISHED OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JUNE 28, 1996

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Case No. 96-02083-B11
R.S. 01451

IN RE: DANIEL SANDERS DBA PARK ROSSINI PROPERTIES DBA THE SHEFFIELD COTTAGE, DBA SANDERS ENTERPRISES

Debtor

WILLIAM F. BLATNICK and DARLYNE BLATNICK, TRUSTEES OF THE BLATNICK FAMILY TRUST, TERRY BLATNICK and LISA MENDENHALL

Movants

v.

DANIEL SANDERS DBA PARK ROSSINI PROPERTIES DBA THE SHEFFIELD COTTAGE, DBA SANDERS ENTERPRISES, KAREN LEE SANDER, ORVA LEWIS,TRUSTEE OF THE ORVA LEWIS TARGET BENEFIT TRUST PLAN

Respondents

MEMORANDUM DECISION

In California, and other jurisdictions which utilize a typical race-notice statutory scheme for recordation and perfection, prepetition foreclosure sales have been avoided when the debtor "won the race to the courthouse" by filing bankruptcy after the sale but before the trustee's deed had been recorded. In Re: Duncombe, 143 BR 243 (Bankr., C.D. Cal. 1992). In response to the frustration expressed by lenders and foreclosure trustees, the California Legislature in 1993 amended California Civil Code section 2924(h) to provide in relevant part:

> For the purposes of this subdivision, the trustee's sale...shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days after the sale....

The statute was intended to provide relation back to the date and time of recordation if accomplished within 15 Calendar days. It is of particular interest that the statute provides for relation back to 8 a.m., which will generally be a time before the trustee's sale actually occurred or became "final upon acceptance of the last and highest bid...." Cal. Civil Code 2924h(c).

Daniel Sanders (Petitioner) filed the present bankruptcy petition at 9:06 a.m. on February 15, 1996. The filing occurred less than an hour before the scheduled nonjudicial foreclosure sale on the real property owned by the debtor, which had been noticed for 10:00 a.m. On February 15, 1996 at 1:00 p.m., the nonjudicial foreclosure sale was completed. The debtor did not provide notice to the foreclosure trustee that a bankruptcy petition had been filed. A Trustee's Deed Upon Sale was recorded on February 16, 1996 at 2:59 p.m. Secured Creditors ("Movants") are the holders of a promissory note in the

original amount of $125,000. The Movants now seek to uphold the validity of the foreclosure sale at which they obtained title to the property through a credit bid. The Movants argue that the sale should be validated either because perfection relates back to 8:00 a.m. the morning of the sale or because the court may annul the automatic stay.

This Court has subject matter jurisdiction pursuant to 11 U.S.C. 1334 and General Order 312-D of the United States District Court for the Southern District of California. This is a proceeding under 28 U.S.C. 157(b) (2) (G).

The debtor had previously filed a Chapter 11 proceeding before this Court. On November 14, 1995, that case was converted to one under Chapter 7. The Movants obtained Relief from Stay in that action in order to foreclose on that property be order entered January 17, 1996. The debtor contends that the Chapter 7 Trustee submitted no opposition to the Movants Motion for Relief from the Automatic Stay. On January 28, 1996 the Chapter 7 trustee filed a notice of intent to abandon the subject property back to the debtor. On February 14, 1996, the day before the scheduled foreclosure sale, the court entered the debtor's request for a discharge in the Chapter 7 case.

The Movants claim that the promissory note became payable in April 1994 and the debtor did not pay the balance on the note and has not made payments sine that time. The Movants further assert that the debtor filed his first Chapter 11 petition before notice of default could be published. They state that they have had to wait over a year to exercise their right to foreclose. The Movants assert that there is no equity over and above liens on the property and that the foreclosure sale should be validated. The Movants argue that the sale can be validated either of two ways. First, the foreclosure sale related back to 8:00 am, of the day of the sale pursuant to California Civil Code 2924h(c). Second, the stay should be annulled pursuant to Section 362(d) for bad faith.

DISCUSSION

As noted, the Movants argue that California Civil Code 2924h (c) provides for the relation back of a foreclosure sale to 8:00 a.m. of the date of the sale so long as it was recorded within fifteen days of the date of the sale. Because the trustee's deed was recorded on day after the sale, operation of section 2924h(c) would perfect the foreclosure sale as of :8:00 a.m. February 15, 1996. Consequently, debtor's interest in the property would have been eliminated prepetition, the property would not have become property of the estate under 11 U.S.C. 541 and would not be subject to the automatic stay which arose at 9:06 a.m. when the debtor filed his current bankruptcy petition.

The court has already alluded to its curiosity about the legislature's choice in the amendment to provide for relation back to 8:00 a.m. on the date of foreclosure, rather than to the moment of foreclosure. If the legislature was intending to address only the Duncombe situation, where the foreclosure sale occurred prepetition, but recordation was postpetition, the legislature need only have provided for relation back to the moment the foreclosure sale was "final", as that moment is defined in the statute. Perhaps because of ambiguity of when that moment might actually occur, and the evidentiary issues which might arise in trying to establish it, or for other reasons, the legislature chose to provide relation back to 8 a.m. which gives rise to the dispute presently before the court.

The seminal facts in this case are that not only did the recordation occur postpetition, but the foreclosure sale itself was conducted postpetition, albeit without the knowledge of the bankruptcy filing. Under federal law, the foreclosure sale was a void act because it was conducted postpetition, in violation of the automatic stay of 11 U.S.C. Section 362.

The Ninth Circuit has clearly stated its position that any violation of the automatic stay is void and without effect.

In re Stringer 846 F.2d 549 (9th Cir. 1988), In re Schwartz 954 F.2d 562 (9th Cir. 1992); In re Krueger 88 BR 238, 241 (9th Cir. BAP 1988). Thus, under the Ninth's Circuit's view of 362(a), any prohibited action that takes place after the filing of the bankruptcy is void. If California Civil Code Section 2924h(c) provides for a postpetition action to relate back to before the bankruptcy was filed, it conflicts with federal law and it is preempted by federal bankruptcy law. Hillsborough County v. Automated Medical Labs, 471 U.S. 707 (1985); In re Rega Properties Ltd., 894 F.2d 1136 (9th Cir. 1990). Under these circumstances, state law cannot make valid a foreclosure sale conducted in violation of the automatic stay by providing that the void act relates back to a time before it occurred. In this court's view , 2924(h)(c) may properly be invoked, if at all, where there is a valid foreclosure sale which occurs prepetition. In that situation, the California law facilitates the completion of a valid transfer of property and there may be no bankruptcy interest in preventing the recording of a valid interest in property. Whether that view is correct , however, is for another day, and a case which presents those facts.

On the facts of this case, the court holds that the foreclosure sale conducted postpetition is void, and recordation of the trustee's deed a day later cannot resuscitate the void sale by reliance on a state statute that would relate back to a time when it would not have been prohibited.

Accordingly, relief from the automatic stay on that ground is denied.

Movants also seek annulment of the stay on the ground that the instant bankruptcy petition was filed in legal bad faith which may constitute cause cause for relief under 11 U.S.C. 362(d) (1). It is well established that a lack of good faith in the filing of a Chapter11 is cause to vacate the automatic stay. In re Little Creek Development Co. 779 F2d 1068, 1071 (5th Cir, 1986); In re Andrews, 17 B.R. 515, 519

(Bankr. C.D. Cal. 1982). While determining the good faith of a debtor's filling, a court should take into account the totality of the circumstances. Marsh v. Marsh, 36 Fd 3d 825 (9th Cir. 1994); Downey Savings and Loan Assoc. v. Metz, 29 F.2d 1495, 1498 (9th Cir. 1987). The Ninth Circuit has specifically agreed that the finding lack of good faith depends upon an amalgam of facts and that once such a finding is made it is cause to grant relief from the automatic stay. In re: Arnold, 806 F. 2d 937, 939 (9th Cir. 1986). It is also well established that the Bankruptcy Court has authority to annul the automatic stay. 11 U.S.C. 362(d). The Ninth Circuit has stated that a court is not prohibited from giving nunc pro tunc effect to an order of annulment. Algeran v. Advance Ross Corp., 759 F2d 1421 (9th Cir. 1985) A court may use its discretion to retroactively lift the stay or annul the stay to validate a pre-petition act. Swartz, 954 B.R. at 572. Thus, the Bankruptcy Court has the power to annul the automatic stay to validate actions taken while the stay was in effect that would otherwise be voided by the stay. In re Jewett, 146 B.R. 250, 252 (9th Cir. BAP).

The debtor's new filing doe, not, in itself, constitute bad faith. Downey Saving and Loan Assoc. v. Metz, 20 F. 2d 1495, 1497 (9th Cir. 1987). However, the fact of successive filings is evidence that can be considered with the other circumstances to make a bad faith determination. Id. While the Code does not prohibit a debtor from filing a Chapter 11 petition subsequent to a discharge under Chapter 7, it does prevent a debtor from receiving another discharge ofd his debt in the subsequent Chapter 11 proceeding. 11 U.S.C. 1141 (d) (3).

Because the debtor cannot obtain a discharge, a question arises as to whether there is any legitimate purpose to the present filing. Although Metz involved a Chapter 13 after a Chapter 7 discharge, it is instructive in the present circumstances of a Chapter 11 after a Chapter 7. Metz teaches that a "bona fide change in circumstances" may

support a successive filing when coupled with indicia of good faith. In Metz, the debtor had demonstrated his good faith by "keeping payments on his house current" (820 F.2d at 1498) during the Chapter 7. In addition the debtor had illustrated changed circumstances by an increase in salary. By necessary implication, however, discharge of unsecured debts through the Chapter 7 would not in itself constitute sufficient changed circumstances simply because the debtor could devote more resources to the now targeted elimination of old debt.

In the present case, debtor had not demonstrated good faith by maintaining current payments on the subject property during the prior case. Debtor made certain payments pursuant to an adequate protection order in the prior Chapter 11, but relief from stay was granted after the case was converted to Chapter 7. In addtion, debtor allowed the property taxes to accrue unpaid against the property. Further, debtor has not shown sufficient change in circunstances to support this successuive filing, made on day after the entry of the Chapter 7 discharge. Lastly, debtor has not showbn how there is any realistic prospect of reorganization within a reasonabvle period of time, particularly in light of debtor's failure to reorganize in their prior Chapter 11. There has been no meaningful showing of how circumstances are different from the representations made by the debtor previously, except for the discharge of certain debts in the Chapter 7.

Under all the circumstances of this case, the Court holds that Movants have established that the present case is a bad faith filing as to them, sufficient to find cause for relief from the automatic stay under 11 U.S.C. 362(d)(1). Moreover, because of the history of this case, and the conduct of both debtor and his counsel in not notifying either movants or the foreclosure trustee of the filing prior to the foreclosure sale, annulment of the stay is warranted.

Accordingly, the automatic stay which arose pursuant to 11 U.S.C. 362 upon the filing of the instant bankruptcy petition shall be, and hereby is, annulled as to the Movants,

their heirs, beneficiaries, assignees or transferees for purposes of perfecting title in the subject property and to take all steps permitted by applicable state law to reduce the subject property to their possession.

IT IS SO ORDERED
Dated: Jul 28 1996

/s/PETER W. BOWIE
Judge
United States Bankruptcy Court

APPENDIX B UNPUBLISHED OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT FILED NOVEMBER 28, 1997

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT
BAP No. SC-96-1676 RyRO
Bk No. 96-02083-B11

IN RE: DANIEL SANDERS

Debtor

DANIEL SANDERS

Appellant

v.

WILLIAM F. BLATNICK and DARLYNE BLATNICK, TRUSTEES OF THE BLATNICK FAMILY TRUST, TERRY BLATNICK and LISA MENDENHALL

Appellees

MEMORANDUM

Argued and submitted on November 21, 1997 at San Diego, California

Filed November 28, 1997

Appeal from the United States Bankruptcy Court for the Southern District of California

Peter W. Bowie, Bankruptcy Judge, Presiding

Before RYAN, RUSSELL and OLLASON, Bankruptcy Judges

[1]Appellees William Blatnick., Darlyne Blatnick, Trustees of the Blatnick Family Trust, Terry Blatnick, and Lisa Mendenhall (collectively, "Appellees'), filed a motion for relief from the automatic stay (the "Motion") under Bankruptcy Code (the "Code")[2] 362 (a) (1). The bankruptcy court granted the Motion. In its memorandum decision, the bankruptcy court found that appellant Daniel Sanders ("Debtor"), had filed his Chapter 11 petition in bad faith and annulled the stay. Debtor timely appealed but failed to stay the sale of the unimproved real property (the "Property") pending the appeal. The Property has since been sold to a party. We DISMISS the appeal as moot.

1. FACTS

On December 28, 1994, Debtor and his wife filed the first Chapter 11 bankruptcy petition. The case was converted to chapter 7 on November 14, 1995.

Appellees hold a $125,000 promissory note secured by a first trust deed on the Property. Appellees brought a motion for relief from the automatic stay claiming that Debtor and his wife had no equity in the property and that Appellees

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[1] This disposition is not appropriate for publication and may not be cited by or to the courts of this circuit except when relevant under the doctrine of law of the case. res judicata , collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

[2] The Code is set forth in 11 U.S.C. 101-1330 (1994).

lacked adequate protection. The bankruptcy granted the motion, and the order was entered on January 17, 1996.

On February 14, 1996, the bankruptcy court granted Debtor's discharge. Appellee's foreclosure sale was scheduled February 15, 1996 at 10:00 a.m. However, on February 15, 1996 at 9:06 a.m. Debtor filed another chapter 11 bankruptcy petition (the "Second Petition"). As Debtor did not did not provide notice of the bankruptcy filing, Appellees purchases the Property at the foreclosure sale (the "Sale") that same day at 1:00 p.m. On February 16, 1997, the trustee's deed upon sale was recorded.

After discovering that the debtor has re-filed, Appellees file the Motion on April 26, 1996 to obtain relief from the automatic stay and to validate the Sale. Appellees alleged that the sale was valid under California Civil Code 2924(h)[3] or that the stay should be annulled due to the Debtor's bad faith in filing the Second Petition.

In a memorandum decision entered on July 1, 1996 (the "Memorandum Decision"), the bankruptcy court rejected Appellees' first argument, but held that cause existed to annul the stay because the Second Petition was filed in bad faith. Blatnick v. Sanders (In re Sanders), 198 B.R. 326, 329-30 (Bankr. S.D. Cal. 1996). The order granting the Motion was entered on July 1, 1996, and the Debtor filed the notice of appeal on July 11, 1996.

On October 27, 1997, Appellees filed a motion to dismiss the appeal as moot because Appellant sold the Property to a third party, escrow closed on September 16, 1997, and Debtor failed to obtain a stay pending appeal. On November 17, 1997, Debtor filed as response arguing that Appellees' foreclosure sale was void.

II. ISSUE ON APPEAL

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[3] This section provides for the relation back of a deed recordation to 8:00 a.m. on the actual date of the foreclosure sale.

Whether this appeal is moot.

III. STANDARD OF REVIEW

Mootness is a jurisdictional issue which the appellate courts review de novo. Arnold and Baker Farms v. United States (In re Arnold and Baker Farms), 85 F. 3d 1415 (9th Cir. 1996), cert. denied , 117 S. Ct. 61 (1997); Baker and Drake Inc. v. Public Serv. Comm'n (In Re Baker & Drake Inc.), 35 F. 3d 1348, 1351 (9th Cir. 1994).

IV. DISCUSSION

We must dismiss an appeal on the grounds of mootness "where an appellant neglected to obtain a stay pending appeal and the rights of third parties have intervened." Spiritos v. Moreno (In re: Spiritos), 992 F. 2d 1004, 1006 (9th Cir. 1993). "'The classic example of mootness in the bankruptcy context is a case in which the debtor has failed to seek a stay of foreclosure and the debtor's property has been sold. The transfer to a third party precludes meaningful relief.'" In re Arnold and Baker Farms, 85 F. 3d at 1419-20 (quoting Baker and Drake, 35 F.3d at 1351). See also In re Combined Metals Reduction Co., 557 F. 2d 179, 19 (9th Cir. 1977) (dismissing as moot appeals from orders approving and confirming sales and leases made to third parties not before the court). However, "(b)bankruptcy's mootness rule operates only when a purchaser (buys) and asset in good faith." Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land Co.) 846 F.2d 1170, 1173 (9th Cir. 1988)(citing Algeran, 759 F. 2d at 1424-25). The primary goal of the mootness rule "is protect the interest of a good faith purchaser...of the property," thereby assuring the finality of sales. Community Thrift and Loan v. Suchy (In re Souchy), 786 F. 2d 900, 901-02 (9th Cir. 1985).

Here, the Property was sold to a third party. Debtor has not alleged that the Property was purchased in bad faith, but, rather, that the sale was void. Because the Debtor failed to obtain a stay pending appeal and the Property is no longer in Appellee's possession, we conclude the sale is moot. Additionally, no mootness exception applies here.

V. CONCLUSION

We do not have jurisdiction over this appeal because Appellees' sale of the Property to a third party and Debtor's failure to obtain a stay pending appeal have rendered this appeal moot. Accordingly, this appeal is DISMISSED.

APPENDIX C UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 24, 1998

NOT FOR PUBLICATION
FILED AUGUST 24, 1998
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 98-55124
BAP No. SC-96-1676 RyRO

IN RE: DANIEL SANDERS

Debtor

DANIEL SANDERS

Appellant

v.

WILLIAM F. BLATNICK

Appellee

MEMORANDUM[1]

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Ryan, Russell, and Ollason, Judges, Presiding

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

Submitted August 17, 1998[2]

Before: O'SCANNLAIN, RYMER, and HAWKINS, Circuit Judges.

Daniel Sanders appeals pro se from the order of the Bankruptcy Appellate Panel dismissing his appeal of an order of the Bankruptcy Court. The BAP dismissed his appeal after finding that after finding that Sanders had failed to obtain a stay pending appeal in the BAP and that the property in question had been sold to third parties. We affirm the BAP's dismissal of Sanders appeal as moot because the property was sold to a third party pending appeal to the BAP, and Sanders failed to allege that the property was purchased in bad faith. See Spiritos v. Moreno (In re: Spiritos), 992 F. 2d 1004,(9th Cir. 1993)(dismissing appeal as moot when appellant failed to obtain a stay pending appeal and the rights of third parties have intervened). Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land Co.) 846 F.2d 1170 (9th Cir. 1988) ("mootness rule operates only when a purchaser bought an asset in good faith").

AFFIRMED

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[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. 34-4